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No. 02-9410

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

MICHAEL D. CRAWFORD,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Washington

REPLY BRIEF FOR PETITIONER

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15 pp

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TABLE OF CONTENTS

REPLY BRIEF FOR PETITIONER 1

A. This Court Should Resolve the Split of Authority Over Whether the Confrontation Clause Permits the Admission of an Accomplice's Custodial Statement on the Ground that it "Interlocks" with the Defendant's Confession. 1

B. This Court Should Reexamine the *Ohio v. Roberts* Framework and Hold that the Confrontation Clause Renders Out-of-Court "Testimonial" Statements, Such as Accomplices' Custodial Confessions, Per Se Inadmissible Against Criminal Defendants. 6

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Anderson v. Cowan, 61 F. Supp. 2d 770 (N.D. Ill. 1999), *aff'd*, 227 F.3d 893 (7th Cir. 2000) 2

Cruz v. New York, 481 U.S. 186 (1987) 4

Galvin v. Kelly, 79 F. Supp. 2d 265 (W.D.N.Y. 2000) 2

Grabow v. Commonwealth, 34 S.W.3d 63 (Ky. 2000) 2

Lee v. Illinois, 476 U.S. 530 (1986) 4

Lilly v. Virginia, 527 U.S. 116 (1999) 5, 6, 7

Ohio v. Roberts, 448 U.S. 56 (1980) 6

People v. Brensic, 506 N.Y.S.2d 570 (N.Y. App. Div. 1986), *rev'd*, 70 N.E.2d 1226 (N.Y. 1987) 2

Simmons v. Whitley, 1991 WL 129813 (E.D. La. 1991) 2

State v. Earnest, 744 P.2d 539 (N.M. 1987) 3

State v. Gilliam, 635 N.E.2d 1242 (Ohio 1994), *overruled in part on other grounds by* 3

State v. Grabner, 2001 WL 783759 (Wash. App. 2001) 3

State v. Holt, 1997 WL 117073 (Wash. App. 1997) 4

State v. LaBounty, 716 A.2d 1 (Vt. 1998) 3

State v. Madrigal, 721 N.E.2d 52 (Ohio 2000) 3

State v. St. Pierre, 111 Wn.2d 105, 759 P.2d 383 (Wash. 1988) 2

State v. Williams, 1999 WL 639461 (Wash. App. 1999) 4

United States v. Gio, 7 F.3d 1279 (7th Cir. 1993) 3

United States v. Koistinen, 27 M.J. 279 (C.M.A. 1988) 2

United States v. Smith, 792 F.2d 441 (4th Cir. 1986) 1, 4

United States v. Wallace, 27 F.3d 564 (table), 1994 WL 276769 (4th Cir. 1994) 4

White v. Illinois, 502 U.S. 346, 365 (1992) 6

Wright v. Idaho, 497 U.S. 805 (1990).....1, 2, 3, 4

Wright v. State, 440 S.E.2d 7 (Ga. 1994).....3

Wrighter v. State, 2003 WL. 318527 (Tex. App. Feb. 13, 2003) 6, 7

REPLY BRIEF FOR PETITIONER

The State's Brief in Opposition does not offer any persuasive reason to deny review of the important Confrontation Clause issues that this case presents. These issues continue to divide courts and to frustrate the proper administration of justice throughout the country, and they should be resolved at once.

A. This Court Should Resolve the Split of Authority Over Whether the Confrontation Clause Permits the Admission of an Accomplice's Custodial Statement on the Ground that it "Interlocks" with the Defendant's Confession.

None of the three arguments that the State advances for denying review of the "interlocking confession" question presented withstands scrutiny.

1. The State acknowledges that federal and state courts are divided over the question whether the Confrontation Clause permits the admission of an accomplice's custodial statement on the ground that it "interlocks" with the defendant's confession. The State contends, however, that this issue does not arise frequently enough to warrant review, suggesting that only eight state high courts and two federal courts of appeals over the past seventeen years have considered the issue. Br. in Opp. at 4. But this assertion understates both the number of courts that actually have considered the issue and the frequency with which it arises in general.

As an initial matter, the Petition for Certiorari cites cases from *twelve* federal and state courts over the *thirteen* years since this Court's decision in *Wright v. Idaho*, 497 U.S. 805 (1990), not from ten courts over the past seventeen years. The State ignores decisions on the "interlocking confession" question presented that the Petition cites from two jurisdictions – Louisiana and the Eastern District of Michigan, *see* Pet. for Cert. at 9 – which also demonstrate that this issue arises with regularity. The State also overlooks the fact that there are several federal and state courts that confronted and resolved the interlocking confession issue arose in the few years before *Wright*. *See, e.g., United States v. Smith*, 792 F.2d 441, 444 (4th Cir. 1986) (condoning admission of nontestifying

accomplice's statement incriminating defendant because it "interlocked" with defendant's prior statement); *United States v. Koistinen*, 27 M.J. 279, 282-83 (C.M.A. 1988) (same); *State v. St. Pierre*, 111 Wn.2d 105, 112-13, 759 P.2d 383 (Wash. 1988) (same); *People v. Brensic*, 506 N.Y.S.2d 570, 588-89 (N.Y. App. Div. 1986) (same), *rev'd*, 70 N.E.2d 1226 (N.Y. 1987) (on state law grounds).

What is more, the "interlocking confession" question presented arises more often than even all of these cases indicate. Further research reveals that at least one other state supreme court recently has confronted the issue. In *Grabow v. Commonwealth*, 34 S.W.3d 63, 79 (Ky. 2000), the Kentucky Supreme Court upheld the admission of an accomplice confession in part because "although the interlocking nature of the defendants' respective confessions is not determinative of admissibility, it is a factor to be considered in determining whether the codefendant's confession has sufficient indicia of reliability." *Id.* at 79. The court, echoing the Washington Supreme Court, concluded that "the discussion in *Wright* appears to pertain to corroborating physical evidence as opposed to the defendant's own confession." *Id.* at 79 n.13. Other federal district courts also have addressed this issue. *Compare Galvin v. Kelly*, 79 F. Supp.2d 265, 271, 275-76 (W.D.N.Y. 2000) (rejecting Confrontation Clause claim in part because nontestifying accomplice's confession was "corroborated by" petitioner's prior custodial statement to police officer) *and Simmons v. Whitley*, 1991 WL 129813, at *2-3 (E.D. La. 1991) (stating that "[w]here an accomplice's statement 'interlocks' with the confession of a criminal defendant . . . the confession may be admissible" and upholding admission of accomplice statement on this basis) *with Anderson v. Cowan*, 61 F. Supp.2d 770, 776 (N.D. Ill. 1999) (admission of confession by codefendant, who was tried before a separate jury, violated Confrontation Clause "even if the . . . statement interlocks with the defendant's own confession"), *aff'd on other grounds*, 227 F.3d 893 (7th Cir. 2000). Accounting for these cases in the calculation of the conflict at issue here, as well as the *Smith* and *Koistinen* decisions cited in the preceding paragraph, deepens the split of

authority to nine-to-seven – including two state supreme courts, one federal court of appeals, and the U.S. military's highest court on one side, and four state courts of last resort on the other side.

Finally, the slightly broader issue implicated by the interlocking confession question presented – whether the Confrontation Clause's anti-corroboration rule is limited to physical evidence – also has arisen with regularity (and with conflicting results) in pre- and post-*Wright* cases. *Compare* Pet. for Cert. at 9-10 (citing two federal appellate decisions holding that anti-corroboration rule extends to trial testimony) *with United States v. Gio*, 7 F.3d 1279, 1288-89 (7th Cir. 1993) (allowing admission of accomplice's statements incriminating defendant because they were corroborated by other testimony at trial); *State v. Gilliam*, 635 N.E.2d 1242, 1246 (Ohio 1994) (same), *overruled in part on other grounds by State v. Madrigal*, 721 N.E.2d 52, 56 (Ohio 2000); *State v. Earnest*, 744 P.2d 539, 540 (N.M. 1987) (same).

Even all of the foregoing citations, of course, vastly underrepresent the importance of the interlocking confession question presented and the need for this Court to clarify the scope of *Wright*'s anti-corroboration rule. This issue often arises in trials that do not ultimately generate an appellate decision on the issue. *See, e.g., State v. LaBounty*, 716 A.2d 1, 6 (Vt. 1998) (trial court admitted statement based on "interlock" theory; supreme court suggested that this was erroneous but affirmed on other reliability grounds); *Wright v. State*, 440 S.E.2d 7, 9 (Ga. 1994) (noting that trial court admitted "interlocking" statement of accomplice but resolving case on harmless error grounds instead of deciding Confrontation Clause issue). Indeed, most states do not publish *any* of their trial courts' decisions, and many pretrial orders in federal district courts are never published, so in untold numbers of prosecutions there is no reported record of the issue's presence or effect on the case. But it is worth noting that once courts such as Washington's rule that interlocking confessions are admissible, prosecutors in those jurisdictions appear to invoke this reliability loophole frequently. *See State v. Grabner*,

2001 WL 783759, at *4 (Wash. App. 2001) (upholding admission of accomplice confession because it "interlocked"); *State v. Williams*, 1999 WL 639461, at *5-6 (Wash. App. 1999) (same); *State v. Holt*, 1997 WL 117073, at *9 (Wash. App. 1997) (same); *cf. United States v. Wallace*, 27 F.3d 564 (table), 1994 WL 276769, at *1 (4th Cir. 1994) (noting that the government sought to try two accomplices in separate trials "due to a problem with interlocking confessions" – that "problem" presumably being that such confessions are inadmissible in joint trials under *Cruz v. New York*, 481 U.S. 186 (1987), but were held admissible in separate trials in *United States v. Smith*, 792 F.2d 441, 444 (4th Cir. 1986)). The case at issue here is yet another one following this pattern.

In short, it requires minimal research or reflection to realize that police officers frequently arrest multiple suspected accomplices for various crimes and that those alleged accomplices frequently give similar statements while in custody. The issue whether those statements are admissible against persons other than their declarants, therefore, affects the administration of criminal justice – from prosecutors and defense attorneys' preliminary strategies to trials themselves – throughout the country.

2. The State's contention that the Washington Supreme Court's decision allowing the admission of accomplices' interlocking confessions is consistent with this Court's precedent – and particularly with *Lee v. Illinois*, 476 U.S. 530 (1986) – is incorrect. This Court has never upheld the admission of an accomplice's custodial confession that incriminated a criminal defendant on an "interlocking" or any other basis. In *Lee*, this Court held that the Confrontation Clause *prohibited* the admission of the statement at issue. Thus, contrary to the State's suggestion (Br. in Opp. at 3, 5), the *Wright* decision did not need to "overrule" *Lee* in order to put to rest that decision's suggestion that the Confrontation Clause might permit the admission of an interlocking confession.

In any event, whatever the merits of the State's and the Washington Supreme Court's view that *Wright*'s anti-corroboration rule is limited to physical evidence and that interlocking confessions are admissible, four state courts of last resort, two federal courts

of appeals, and three other courts have reached the opposite conclusions. *See* Pet. for Cert. at 8-10. This Court is the only institution that can resolve this conflict over the meaning of the Confrontation Clause and its precedents.

3. Finally, there is no merit to State's argument that the accomplice's statement here would have been admissible irrespective of its interlocking nature because the circumstances surrounding it evince particularized guarantees of trustworthiness sufficient to dispense with adversarial testing.[1] The Washington Court of Appeals rejected this exact argument, holding that a "nine-factor test fails to demonstrate that Sylvia's statement to the police was sufficiently reliable to satisfy the . . . confrontation clause." Pet. App. 13a-14a. In reaching this decision, the court of appeals noted that at the time of her statement Sylvia was in police custody for her potential involvement in a crime; that her statement described past events; that she had a motive to lie in order to shift some blame away from herself; that she apparently had lied to the police several hours earlier about the events at issue; and that she may have lacked personal knowledge on the crucial issue of whether Petitioner acted in self-defense because she "stated that she shut her eyes during the stabbing." App. 13a. The Washington Supreme Court did not take issue with the court of appeals' holding on this point, and neither of the non-interlocking-related circumstances the State points to in its Brief in Opposition even begins to overcome the "presumptive unreliability that attaches to accomplices' confessions that shift or spread blame . . . when the government is involved in the statements' production, and when the statements describe past events." *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion) (holding that custodial statement by

[1] Although the State terms this a "harmless error" argument (Br. in Opp. at 6), it does not dispute the Washington Court of Appeals' conclusion that if the admission of Sylvia's statement violated the Confrontation Clause, this error had a prejudicial effect on the jury verdict and requires reversal. *See* Pet. for Cert. at 12-13; Pet. App. 15a. Rather, the State's argument here is that even if the evidence of "interlock" cannot support the admission of Sylvia's statement, the statement's admission still did not violate the Confrontation Clause.

defendant's relative, his brother, was unreliable). Consequently, the question whether the Confrontation Clause permitted the admission of Sylvia's custodial statement on the ground that it "interlocked" with Petitioner's is squarely presented here.

B. This Court Should Reexamine the *Ohio v. Roberts* Framework and Hold that the Confrontation Clause Renders Out-of-Court "Testimonial" Statements, Such as Accomplices' Custodial Confessions, Per Se Inadmissible Against Criminal Defendants.

As the Petition for Certiorari explained, the split of authority at issue here is merely emblematic of the confusion – and, indeed, the subversion of basic principles of adversarial justice – that continues to flow from the framework that this Court established in *Ohio v. Roberts,* 448 U.S. 56 (1980). The State, in fact, does not dispute that the choice between the *Roberts* framework and the "testimonial" approach described in the Petition presents an issue of substantial importance because courts across the Nation commonly admit accomplice confessions and other out-of-court statements against criminal defendants that would be per se inadmissible under the testimonial approach. *See* Pet. for Cert. at 17-20.

Another example of such a decision from just a few months ago exemplifies the significance of this issue. In *Wrighter v. State,* 2003 WL 318527 (Tex. App. Feb. 13, 2003), the police arrested and questioned two men whom they accused of committing a murder. One of the men admitted being present at the shooting but asserted that he had acted "in self-defense." He also stated that the defendant had participated in the crime. But this accomplice did not testify at the defendant's trial. Instead, the prosecution offered and the court admitted a tape recording of his custodial statement incriminating the defendant. This procedure constituted a "paradigmatic" violation of the defendant's confrontation right under the testimonial approach. *Lilly,* 527 U.S. at 143 (Scalia, J., concurring in part and concurring in the judgment); *accord White v. Illinois,* 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment). Yet the Texas Court of Appeals upheld the statement's admission under Texas hearsay law as a

statement "against penal interest" and then, effectively as a direct consequence, under the *Roberts* Confrontation Clause framework. *Wrighter,* 2003 WL at *3-6. The court reached this conclusion even though the accomplice in his statement expressly refused to take criminal responsibility for his actions and even though the four-Justice plurality in *Lilly* expressly held that the Confrontation Clause does not permit the admission of out-of-court statements that "spread" criminal blame simply because they are technically against penal interest. *Lilly,* 527 U.S. at 133-34.

This decision and the others cited in the Petition for Certiorari illustrate the manipulability and inconsistency of the *Roberts* framework, as well as the confusion over whether the *Lilly* plurality opinion applying that framework is even binding law. *See* Pet for Cert. at 19 n.2. They also show that courts will persist condoning trials that violate the text and the core purpose of the Confrontation Clause unless and until this Court adopts the testimonial approach – an approach that properly construes the Clause as bright-line principle of criminal procedure instead of a nebulous afterthought to state hearsay law. *Cf. Lilly,* 527 U.S. at 140-41 (Breyer, J., concurring) (doubting that Framers intended Confrontation Clause to be tied "so directly to the hearsay rule"). Accordingly, this Court should heed the recent calls of this Court's Justices, leading scholars, and the United States Solicitor General to reexamine the *Roberts* framework and to consider embracing the testimonial approach to the Confrontation Clause. *See* Pet. for Cert. at 14-16.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 12, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2003, I served counsel of record with a true and correct copy of the following documents:

1. Reply Brief for Petitioner; and

2. Certificate of Service

by causing the same to be delivered via Federal Express to:

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Re: *Michael D. Crawford v. State of Washington*, No. 02-9410

Dear Clerk of the Court:

Enclosed please find an original plus 11 copies of a Reply Brief for Petitioner and Certificate of Service for filing. Please return a conformed copy in the envelope provided.

Thank you for your attention to this request. Please call if you have any questions.

Very truly yours,

Davis Wright Tremaine LLP

Jeffrey L. Fisher

Enclosures